**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **GARY J. WATERS** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 245,623 |
| **CEREAL FOOD PROCESSORS** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **TRAVELERS INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent and its insurance carrier request Appeals Board review of a Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler on September 15, 1999.

## ISSUES

The Administrative Law Judge found claimant had given timely notice of accident and ordered respondent to provide claimant with medical treatment. Judge Foerschler did not order respondent to pay temporary total disability compensation and did not order respondent to pay the past medical expenses. Instead, respondent was ordered to "have claimant examined by a competent specialist of its choice to determine and report any relation of the December incident to the treatment afforded claimant by the private care providers. . . . Other issues will remain under advisement pending review of this report."

Respondent disputes the finding that claimant gave timely notice of accident.

Claimant contends the ALJ exceeded his authority when he ordered the respondent to select a physician to determine and report any relation the December incident had to the treatment afforded claimant by the private health care providers because, under K.S.A. 44-516, the ALJ is to select a neutral health care provider to make such an ordered examination.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant, Gary Waters, works for respondent's flour mill in maintenance. He describes his job duties as including climbing ladders, lifting, crawling underneath machines to repair them and whatever else needs to be done.

On December 16, 1998 claimant and a co-worker, Robert Turner, were removing an air conditioner from the window of Tom Miller's office. Claimant was inside the office while Robert Turner was outside pushing the air conditioner to claimant. The air conditioner was approximately eight feet off the floor and claimant was standing on a chair. When Mr. Turner pushed it through to claimant, he balanced the 100 pound air conditioner on his head until Mr. Turner came around to help him get down off the chair with the air conditioner. He and Mr. Turner then took the air conditioner downstairs and put it in storage.

Claimant testified that when he brought the air conditioner down off his head it felt like he had pulled a muscle in his neck. Claimant described having pain in his neck, right shoulder and right arm. He immediately told Mr. Turner that he thought he had pulled a muscle in his neck because it was hurting and he was starting to get a headache. That same day he told his supervisor, Doug Hull, the same thing. Claimant also on December 16, 1998 wrote down in the log book of the first aid kit located in the cafeteria that he pulled a muscle in his neck picking up an air conditioner out of Tom Miller's office. Claimant testified that he was instructed to write injuries down in this log book.

Claimant admitted that when he started working for respondent he was given certain safety rules to review. Those rules require all injuries to be reported to a supervisor, but do not mention reporting injuries in the first aid log. These safety rules are also posted on the main bulletin board in the lobby at work. After December 16, 1998 and up until May 13, 1999 when claimant was unable to return to work, claimant does not recall whether he reported neck or shoulder problems to any supervisor.

Claimant continued working. He described his symptoms as getting worse as time went on. Overhead lifting caused him the most problems and his job required him to lift shafts weighing 200 to 300 pounds. Lifting shafts was generally done with the assistance of a co-worker. Claimant testified "I'd try to keep working and try to work it out and the longer I kept working it would get worse and worse."

On May 13 claimant went on his own to his personal physician, Dr. Martin L. Rhodes. Dr. Rhodes obtained x-rays and gave claimant a prescription for pain medication. He also took claimant off work. Claimant took the off-work slip from Dr. Rhodes and gave it to Tom Miller, another supervisor, because Doug Hull was not available.

On May 16, 1999 claimant sought medical treatment at the Shawnee Mission Medical Center Emergency Room. Eventually Dr. Rhodes referred claimant to orthopedic

surgeon, Dr. Fred A. Rice, Jr. Because Dr. Rice was not covered on claimant's health insurance he switched to another orthopedic surgeon, Dr. Chris J. Maeda. Claimant was diagnosed with a herniated cervical disc and underwent surgery June 1, 1999. The surgery involved a fusion and internal fixation with instrumentation.

After being taken off work by Dr. Rhodes claimant attempted to obtain sickness and accident benefits through respondent. At that time he did not inform his employer that his injury was related to the December 16, 1998 incident or otherwise work related. But when completing the form there was a question that asked whether the injury arose out of employment to which claimant answered "yes". Because of the injury being work related, sickness and accident benefits were denied. The claimant signed and dated the sickness and accident form on June 3, 1999. Claimant did not specify what he did with the form, however.

Claimant denies suffering any injuries to his neck, right shoulder or right arm before December 16, 1998.

Before he first went to Dr. Rhodes, claimant had been on vacation for two weeks. On the day he was to return to work from vacation claimant called and told Mr. Hull that he was going to see his family doctor for neck problems. At that time claimant did not report to either Mr. Hull or Dr. Rhodes any history of an accident or injury at work. Claimant said he did not know how it happened. Dr. Rhodes' office records reflect claimant reported having neck and shoulder pain for a couple of weeks. He denied having sustained any specific injury or trauma to either his neck or shoulder. When claimant saw Dr. Rice on May 18, 1999 he reported having problems for a couple of weeks and again did not mention a work injury. Claimant first saw Dr. Maeda May 24, 1999. Claimant told Dr. Maeda that his neck and shoulder problems started two or three weeks earlier while on vacation. Again, claimant did not mention any accidents at work. The first mention to Dr. Maeda that he had an accident at work was 10 days after his June 1, 1999 surgery.

The first time after December 16, 1998 that claimant reported to his employer that his neck injury was work related was when he called the insurance carrier. Before this claimant never told any supervisor that his treatment was connected with the December 16, 1998 incident or was otherwise work related. Claimant testified that the reason he did not initially relate his symptoms to the December incident was that he did not recall it at the time he saw the physicians. It was not until about the time he was asked on the sickness and accident form that he made the connection.

Claimant denied knowing anything about workers compensation when the accident occurred but the record also shows that he admitted having numerous workers compensation injuries when he worked for a prior employer and three prior workers compensation injuries with respondent. But claimant said he was never provided medical treatment for those injuries. Claimant then admitted that he was at least familiar with the concept of workers compensation.

Mr. Hull testified that whenever an accident or injury is reported to him he is required to fill out an accident investigation report on a form provided by respondent. He has searched his records and there is no such report for the December 16, 1998 incident described by claimant. Mr. Hull further testified that the log by the first aid kit in the cafeteria was for the purpose of keeping inventory of its contents and not for reporting accidents. The first aid kit is maintained by a third party contractor. He said no one in a supervisory position with respondent reviews that log. But later admitted that the log has a place for a supervisor's initials and that some entries are initialed by him.

Mr. Hull specifically denies that claimant ever mentioned injuring his neck or shoulder to him on December 16, 1998. Mr. Hull testified that he first became aware that claimant was having complaints of neck or shoulder pain the day claimant was supposed to have returned from vacation, May 14, 1999. Before that date claimant never complained of neck or shoulder pain, according to Mr. Hull. On May 14, 1999 claimant called Mr. Hull and informed him he was having shoulder problems and he was going to see his family physician. Claimant did not relate these problems to work. Claimant did not ask for medical treatment to be provided by respondent. Likewise, when claimant called and asked for the sickness and accident forms in June of 1999, claimant again did not indicate that his condition was work related. Respondent contends the first notice it received of this accident was when claimant called the workers compensation insurance carrier on June 25, 1999. But Mr. Hull does not dispute that claimant was involved in removing an air conditioner in December nor does he dispute that claimant's job duties involve a fair amount of lifting and working in awkward positions.

Mr. Turner also testified. He confirmed that claimant mentioned neck, head and back pain after they moved the air conditioner on December 16, 1998. Mr. Turner also said he was present when claimant reported his neck and back pain to Mr. Hull. Thereafter claimant complained several times about his neck or back bothering him. According to Mr. Turner on some of these occasions Mr. Hull was present when claimant made these complaints as well as on occasion other supervisors including Tom Miller and Tom Krummel. It is noted that Mr. Turner is the brother-in-law of claimant and he no longer is employed by respondent.

The Appeals Board finds that claimant gave notice of accident on December 16, 1998. However, the record does not establish that claimant thereafter suffered a work related aggravation of his injury or that the medical treatment claimant received in May and June of 1999 was related to the December 1998 accident. It appears that the Administrative Law Judge likewise considered the proof of a causal connection between the December accident and June surgery to be tenuous. But he nevertheless found the claim to be compensable and awarded medical benefits. The Appeals Board finds that the record as it currently exists fails to establish a causal connection between claimant's symptoms in May of 1999 and his accident in December 1998. Stated another way, claimant has failed to prove that his current injury arose out of and in the course of his employment with respondent. Preliminary benefits therefore should be denied.

Claimant alleges the ALJ exceeded his jurisdiction in ordering respondent to select a physician to treat claimant and also provide a report on the causation issue. Claimant's argument is premised upon the assumption that the ALJ was entering this order pursuant to K.S.A. 44-516. The Appeals Board agrees that a physician selected by respondent does not fit within the definition of a neutral physician as contemplated by that statute. But the Board does not interpret Judge Foerschler's order as an order for an independent medical examination. Rather the ALJ was ordering medical treatment. As the award of those benefits has been reversed, the order for a report from the authorized treating physician is likewise reversed and the issue raised by claimant is rendered moot.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler, dated September 15, 1999, should be, and is hereby, reversed.

**IT IS SO ORDERED.**

Dated this ____ day of December, 1999.

BOARD MEMBER

c: Denise E. Tomasic, Kansas City, KS
Theresa A. Otto, Kansas City, MO
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director